Supreme Court, U.S.
FILED
JUN 21 1993
OFFICE OF THE CLERK

92-2018

No. _____

IN THE

Supreme Court of the United States

October Term, 1993

Go-Video, Inc.,

Petitioner,

v.

Matsushita Electric Industrial Co., Ltd.; Victor Company of Japan, Ltd.; and Sony Corporation,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Daniel R. Shulman, Esq.
LAW OFFICES OF
DANIEL R. SHULMAN, P.A.
2999 Norwest Center
90 South Seventh Street
Minneapolis, Minnesota
55402

Joseph M. Alioto, Esq.
LAW OFFICES OF
JOSEPH M. ALIOTO
600 Montgomery Street
San Francisco, California
94111

Attorneys for Petitioners.

1993—Northwest Printing Co., 3010 2nd St. No., Minneapolis, MN 55411—588-7506

QUESTION PRESENTED FOR REVIEW

Question No. 1

Are agreements among competitors to set product standards *per se* lawful under the antitrust laws?

Question No. 2

Should circumstantial evidence of an antitrust conspiracy be viewed with greater care than so-called direct evidence?

PARTIES TO THE PROCEEDINGS BELOW

All parties to the proceedings below subject to this petition for writ of certiorari are set forth in the caption of the petition. Petitioner Go-Video, Inc., has no parent company or partially-owned subsidiaries.

TABLE OF CONTENTS

	Page
Questions Presented for Review	i
Parties to the Proceedings Below	ii
Table of Authorities	iv
Opinions Below	1-2
Jurisdiction	2
Statutes Involved	2
Statement of the Case	3
1. Go-Video's Evidence at Trial	6
2. The Trial Court's Jury Instructions	18
(a) Trade Associations	19
(b) Circumstantial Evidence	20
Reasons for Granting the Petition	20
Certiorari Should Be Granted Because the Ninth Circuit's Decision Permits Jury Instructions Directly Contravening a Century of This Court's Antitrust Jurisprudence	20
Conclusion	25

TABLE OF AUTHORITIES

Cases: **Page**

Allied Tube & Conduit Corp. v. Indian Head, 485 U.S. 492 (1988) 21, 22

American Column & Lumber Co. v. United States, 257 U.S. 377 (1921) 22

American Society of Mechanical Engineers v. Hydrolevel Corp., 456 U.S. 556 (1982) 21-22

American Tobacco Co. v. United States, 328 U.S. 781 (1946) . . . 23

C-O-Two Fire Equipment Co. v. United States, 197 F.2d 489 (9th Cir. 1952) 23-24

Esco Corp. v. United States, 340 F.2d 1000 (9th Cir. 1965) 24

Fashion Originators' Guild v. FTC, 312 U.S. 457 (1941) 22

FTC v. Indiana Federation of Dentists, 476 U.S. 447 (1986) 22

Holland v. United States, 348 U.S. 121 (1954) 24

In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation, 906 F.2d 432 (9th Cir. 1990) 24

Lawlor v. Loewe, 209 F. 721 (2d Cir. 1913) 23

Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574 (1986) 3, 24

Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752 (1984) . 24

National Society of Professional Engineers v. United States, 435 U.S. 679 (1978) 21, 22

Radiant Burners v. Peoples Gas Lgt. & Coke Co., 364 U.S. 656 (1961) 22

Sony Corp. v. Universal City Studios, 464 U.S. 416 (1984) 10

United States v. Bowles, 428 F.2d 592 (2d Cir. 1970) 23

United States v. Container Corp. of America, 393 U.S. 333 (1960) 22

United States v. Glasser, 443 F.2d 994 (2d Cir. 1991) 23

United States v. Towers, 775 F.2d 184 (7th Cir. 1985) 23

United States v. United States Gypsum Co., 438 U.S. 422 (1978) 22

United States v. Vega, 860 F.2d 779 (7th Cir. 1988) 23

Rules and Statutes:

Sherman Antitrust Act, § 1, 26 Stat. 209, as amended, 15 U.S.C. § 1, (1988) 2, 3

28 U.S.C. § 1254(1) 2

No. _____

IN THE

Supreme Court of the United States

October Term, 1993

Go-Video, Inc.,

Petitioner,

v.

Matsushita Electric Industrial Co., Ltd.;
Victor Company of Japan, Ltd.; and Sony Corporation,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Petitioner Go-Video, Inc. respectfully prays that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this case on October 9, 1992, rehearing of which was denied on March 22, 1993.

OPINIONS BELOW

The final judgment by the United States District Court for the District of Arizona was entered May 31, 1991, pursuant to a jury verdict rendered May 30, 1991. The district court's final judgment is unreported. A copy of the district court's final judgment is attached hereto as Appendix ("App.") A. The United States Court of Appeals for the Ninth Circuit denied appellant's motion to remand to the district court on April 23, 1992. A copy

of the order is attached hereto as App. B. The opinion of the United States Court of Appeals for the Ninth Circuit was rendered on October 9, 1992, and is unreported. A copy of the opinion is attached hereto as App. C. The United States Court of Appeals for the Ninth Circuit denied petitioner's motion to vacate decision and to remand, and denied a petition for rehearing en banc on March 22, 1993. A copy of the order is attached hereto as App. D.

JURISDICTION

The order of the United States Court of Appeals for the Ninth Circuit denying petitioner's motion to vacate decision and to remand, and petition for rehearing en banc was entered on March 22, 1993. Petitioner has timely filed this Petition for Writ of Certiorari, and the jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The following statutes are quoted in App. E:

> Sherman Antitrust Act, § 1, 26 Stat. 209, as amended, 15 U.S.C. § 1 (1988)

STATEMENT OF THE CASE[1]

This petition raises questions concerning competition in the consumer electronics industry. The decision for which review is sought held that the following jury instructions, although contrary to law, constituted harmless error: (1) agreements among competitors to set product standards are *per se* lawful under the antitrust laws; and (2) circumstantial evidence of an antitrust conspiracy should be viewed with greater care than so-called direct evidence. By so ruling, the Court of Appeals for the Ninth Circuit failed to observe the proper standard of review, disregarded a century of antitrust decisions by this Court, and allowed the trial court to take this Court's decision in *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.* ("*Matsushita*"), 475 U.S. 574 (1986) to an impermissible extreme. The Ninth Circuit's decision affirming the trial court's instructions has created a barrier to the effective private enforcement of the antitrust laws. Certiorari is necessary so that this Court can redress the balance.

Petitioner-plaintiff Go-Video, Inc. ("Go-Video") brought suit against, *inter alia*, a number of Japanese consumer electronics products manufacturers, including respondent-defendants Matsushita Electric Industrial Co., Ltd. ("Matsushita"), Victor Company of Japan, Ltd. ("JVC"), and Sony Corporation ("Sony"). Go-Video's complaint alleged, generally, that the defendants had conspired in violation of § 1 of the Sherman Act, 26 Stat. 209, as amended, 15 U.S.C. § 1 (1988), to prevent the introduction of dual-deck videocassette recorders ("VCRs") to

---

[1]Citations to the record are to the docket number of the document in the record and are cited as either "D___" or "MD___." The citation "D___" refers to a document in the original record in the District of Arizona, CIV 87-0987. The citation "MD___" refers to a document in the record of the Multidistrict Court, 88-MD-765. Documents also reproduced in the excerpts of record submitted to the Ninth Circuit are cited "E___." Plaintiff exhibits received in evidence at trial are cited as "PX___," defense exhibits as "DX___."

the United States and to refuse to deal with Go-Video and anyone else seeking to bring dual-deck VCRs to the United States.[2]

This action went to trial in Phoenix, Arizona in April 1991. At trial, the court received from Go-Video extensive evidence demonstrating that the defendants met regularly, under both the auspices of their trade association and privately, to agree collectively on product standards for the consumer electronics industry. In their own words, the defendants met to decide "what the masses would want."[3] The evidence of these industry-wide meetings and agreements among competitors was overwhelming and unchallenged by the defendants; indeed it came from the deposition testimony of the top executives and representatives of the defendants themselves.

Under this Court's clear precedents, such evidence of the defendants' meetings and agreements to standardize products should have been considered "plus factors," along with parallel conduct, for the jury to consider in deciding whether Go-Video had offered circumstantial evidence sufficient to prove a conspiracy. In most antitrust cases the plaintiff can prove a conspiracy only through circumstantial evidence. Thus, the trial court eviscerated Go-Video's case and contravened one hundred years of this Court's precedents when it instructed the jury (1) that it was *per se* lawful under the antitrust laws for the defendants collectively to agree on product standards; and (2) that the jury should exercise greater care in considering circumstantial evidence of an antitrust conspiracy than so-called direct evidence.

These instructions by the trial court render proof of conspiracies in private antitrust cases impermissibly difficult, and threaten to block effective private enforcement of the antitrust

---

[2] D 1; D 96; D 293.

[3] e.g., MD 978, pp. 116-27; MD 977, pp. 1-7.

laws, particularly against far reaching, wide-ranging conspiracies, such as that of the Japanese consumer electronics manufacturers. The Ninth Circuit recognized that the instructions included incorrect statements of the law, but affirmed the district court's decision nonetheless by concluding that the incorrect statements of the law were remedied by arguably correct statements of the law elsewhere in the jury instructions:

> The above-quoted instruction, by itself, could mislead the jury because it indicates that all such activities of trade organizations are generally legal. That is not the law. Depending on the circumstances, such activities might not survive rule of reason analysis.

(Memorandum of the United States Court of Appeals for the Ninth Circuit, filed October 9, 1992 ("Oct. 9, 1992 Memo."), p. 13.)

Although jury instructions are to be taken as a whole, an incorrect statement of the law is not cured by a correct statement of the law appearing elsewhere in the instructions. The trial court is not free to present conflicting and erroneous statements of the law to the jury, which may be misled by the incorrect statement of the law. Direction from this Court is needed so that effective enforcement of the antitrust laws is not eviscerated.

Go-Video commenced this action on June 22, 1987. The complaint named as defendants eleven motion picture companies; the Motion Picture Association of America ("MPAA"); fourteen Japanese consumer electronics manufacturers, including Matsushita, JVC and Sony; the Electronic Industries Association of Japan ("EIAJ"); three Korean consumer electronics manufacturers; and one American subsidiary of a Japanese manufacturer.

Prior to trial, one defendant, Sony Corporation of America, was dismissed pursuant to summary judgment, and Go-Video entered into settlements with all other defendants, except for

defendant-respondents Matsushita, JVC, and Sony. One of the settlements, with the Korean manufacturer Samsung Electronics Co., Ltd. ("Samsung"), provided that Samsung would manufacture dual-deck VCRs for Go-Video. At the time of trial and through the present, Go-Video was and is marketing this product in the United States pursuant to the settlement. Trial commenced on April 2, 1991, before a jury in the United States District Court for the District of Arizona (Broomfield, J.). The case was submitted to the jury on May 30, 1991. That day, the jury returned its verdict, finding no conspiracy, and judgment was entered for the defendants on May 31, 1991. Go-Video filed an appeal in the Ninth Circuit Court of Appeals on June 6, 1991. In an unpublished decision dated October 9, 1992, the Ninth Circuit affirmed.[4]

1. *Go-Video's Evidence at Trial*

At trial, the court received the following evidence bearing on Go-Video's claim of conspiracy:

A dual-deck VCR is a VCR that contains two ports for video cassettes, rather than a single port. Go-Video is the developer and holder of a United States patent for a dual-deck VCR that is able to record two programs simultaneously, copy from one videotape to another, and record on one deck while displaying a tape on the other deck. Go-Video's dual-deck VCR is now marketed in the United States under the VCR-2™ trademark. Up to the present, all other consumer VCRs sold in the United States have been single-deck VCRs, without the capabilities of the VCR-2™.[5]

Go-Video commenced efforts to bring its dual-deck VCR to market during 1984. In order to market a dual-deck VCR, Go-Video was required to negotiate an agreement for the supply of

---

[4] D 166; D 179; D 417; D 450; D 697; D 709; D 710; D 734; D 929; D 930; D 1078; D 1380; MD 116; MD 118; MD 120; MD 845; MD 861; MD 873; MD 900; MD 1203, p. 56; MD 1201; MD 1203, pp. 75-76; MD 1204 (E 470-71).

[5] MD 1016, p. 32; PX 1120; MD 1018, p. 45; MD 1117, p. 194.

parts or original equipment manufacture ("OEM") with one of the defendants or a licensee of patent rights held by the defendants, who own and control basic VCR patents. Defendants have amassed so many additional patents, numbering in the thousands, as to be able to exclude anyone they are unwilling to license. JVC, a subsidiary of Matsushita, holds the key VHS format patents; Sony holds the key Beta patents. These thousands of VCR patents are freely licensed among the Japanese VCR manufacturers. Sony, Matsushita, and JVC, which hold the basic patents, simply share them under a "free exchange," pursuant to which no royalties are paid. The Japanese VCR manufacturers supply each other with parts, make entire VCRs for each other on an OEM basis, and do not sue each other for patent infringement. The VCR patents, however, are not freely licensed to outsiders. No American consumer electronics company holds a license. The only other licensees are certain Korean companies, such as Samsung, and certain European companies, such as Phillips.[6]

The Japanese VCR manufacturers, including defendants, all belong to a trade association, the EIAJ. The governance of the EIAJ is in the hands of a board of governors and an executive council, which include defendants' top executives. During the period 1984-86, the chairman of the EIAJ was Akio Morita, chairman of Sony. While Mr. Morita chaired the EIAJ, Sony representatives chaired EIAJ committees. The EIAJ executive council met 10-12 times per year, with private luncheon meetings out of the presence of EIAJ staff. Besides meeting at the EIAJ, top executives of defendants met at the Kaidenren, the Japanese Chamber of Commerce, as well as in private meetings to discuss VCR technology and standardization.[7]

---

[6] MD 1016, pp. 49, 51, 129; MD 1019, p. 16; MD 960, pp. 10-18; MD 1018, pp. 29-30; MD 932, p. 50; MD 942, pp. 117-21; MD 960, pp. 19-24, 66-68; MD 978, pp. 89-91; MD 1047, pp. 13-14; MD 920, pp. 107-08; 942, pp. 142-43; MD 1003, pp. 64-66.

[7] MD 960, pp. 104-05; MD 978, pp. 77-82; MD 997, pp. 145-52; MD 978, pp. 121-22.

Below the executive council, the EIAJ was organized into some 200 committees. Among them were the video business committee, the audio business committee, and the television business committee. These three committees met on a monthly basis. The defendants attended these committees, with each company often sending the same representative to meetings of all three committees. Other committees included the overseas copyright committee and the domestic copyright committee. The overseas copyright committee was formed in the early 1980s to oppose foreign legislation imposing royalties on audio and video products used for home recording. Its annual budget for this activity, conducted through "agents" in the United States, exceeded $1,000,000. The copyright committees also met on a monthly basis.[8]

Those attending EIAJ committee meetings presented the positions of their own companies to the other companies, learned the positions of the other companies on the issues discussed, and reported what occurred at the meetings to their superiors. EIAJ committees were also used as a "mailbox," through which the EIAJ and member companies communicated with each other on matters of common concern, where an "industry decision" was desired.[9]

Outside the EIAJ, the defendants met in a wide variety of settings to discuss common issues. The members of the patent departments held regular meetings to discuss patent issues. Top video executives from Sony and Matsushita traveled between Tokyo and Osaka to meet in hotels and restaurants. Chairman Morita of Sony met with the chairman and president of Matsushita to discuss standardization of VCR formats. Top executives from the major manufacturers met to develop technical

---

[8] e.g., MD 920, pp. 20-25, 52-55; MD 960, pp. 101-21.

[9] e.g., MD 1014, pp. 24-39; e.g., MD 1162, pp. 212-13.

standards for future generations of VCRs; they agreed that the "format of the future" would be eight millimeter. Sony regularly met with other makers of Beta-format VCRs; Matsushita and JVC did likewise with other makers of VHS-format VCRs. Managers of the VCR divisions of the Japanese manufacturers met for two to three "golf weekends" each year. The EIAJ also arranged "friendship meetings" for top executives.[10]

Finally, at the very top of the industry, beginning in 1982, Sony chairman Morita organized regular meetings of a group known as the Japan-EC Round Table. This group included the chairmen or presidents of the major Japanese and European consumer electronics companies. No Americans were included. The Round Table met at least annually to discuss products and issues in the consumer electronics industry, including "what would be necessary in future . . . [i]n ten years, in our consumer electronics products area, what would be the public demand; that is to say, what the masses would want."[11]

By 1984, when Go-Video began its efforts to find a dual-deck VCR manufacturer, a number of Japanese VCR makers had already become involved with dual-deck VCRs. This interest reflected and arose out of what had previously occurred in the audio market, where dual-deck audio equipment had rapidly supplanted single-deck hardware as the product of choice.[12]

By mid-1984, Sony had given consideration to a dual-deck VCR, which ultimately came to market as a commercial editing machine, rather than a consumer product. Sanyo was working on the development of a VHS-Beta combination dual-deck as a transition or "cushion" product for when Sanyo went from Beta

---

[10] MD 942, pp. 67-72, 111-43; MD 960, pp. 47-50, 75-84; MD 977, pp. 7-9; MD 1023, pp. 98-100.

[11] e.g., MD 978, pp. 116-27; MD 977, pp. 1-7.

[12] MD 942, pp. 92-97; MD 1042, pp. 153-54.

to VHS machines. By the end of 1984, NEC had discussed supplying a dual-deck to Go-Video on an OEM basis. By early 1985, Go-Video's discussions with NEC, which thought the product a "good idea," focused on specific terms of supply and product design. Finally, by the end of 1984, Sharp had actually made and begun shipping a dual-deck VCR to the Middle East.[13]

In January of 1985, however, the existence of the Sharp machine became known to the American motion picture industry, which had just lost a prolonged fight to block single-deck VCRs, culminating in this Court's decision in January, 1984 in *Sony Corp. v. Universal City Studios*, 464 U.S. 416 (1984). While the Sony case was pending, the MPAA had also tried unsuccessfully to obtain legislation placing a royalty on VCR hardware and software.[14]

When the MPAA learned the Sharp dual-deck VCR was being sold in the Middle East, the MPAA viewed this as a prelude to marketing in the United States, because the Japanese manufacturers had often used the Middle East as the initial market for new products. Top studio and MPAA executives therefore launched a campaign against the dual-deck VCR in the public media, including the *New York Times*, *The Wall Street Journal*, *USA Today*, and other trade publications. The movie industry intended through its publicity to signal to the Japanese VCR makers that they should not bring dual-deck VCRs to the United States.[15]

The MPAA's statements were in fact heard in Japan by the VCR makers, who received copies of the news reports shortly after they appeared in the American press. When the Japanese

---

[13] MD 942, pp. 92-97; e.g., MD 1193, pp. 12-15; e.g., MD 1047, pp. 37-38, 54-79; PX 816; PX 816-YK; e.g. MD 1193, pp. 83-101.

[14] MD 1093, pp. 121-22; MD 1093, pp. 39, 122-24.

[15] MD 1093, pp. 40-41; PX 711; PX 714; PX 732; PX 733; PX 733-YK; MD 1090, pp. 151-53.

VCR makers learned of the MPAA's opposition to the dual-deck, they all believed that marketing the machine in the United States would increase the likelihood of reviving the royalty legislation they had been fighting.[16]

This was also the opinion of the EIAJ's American counterpart, the Electronic Industries Association ("EIA"), most of whose members were American subsidiaries of Japanese VCR makers. The EIA was working closely with the EIAJ to fight the MPAA by hiring lobbyists, organizing "grass roots" coalitions, and meeting with the EIAJ to plan strategy.[17]

Even before the furor over Sharp in January of 1985, Sony and Sanyo had confronted the dual-deck issue. In the summer of 1984, as a "courtesy," the general manager of Sanyo's video division traveled from Osaka to Tokyo to show a prototype of Sanyo's Beta-VHS dual-deck to the Sony general manager. At this meeting, Sony requested Sanyo, if it marketed the product, not to include copying from the Beta deck to the VHS deck (a modification that would have frustrated the basic purpose of the product). Sony also cautioned Sanyo that marketing the dual-deck could create royalty problems for the VCR industry. The Sony general manager then reported the discussion to Sony's management committee, which responded with silence, which, as a matter of custom and practice, he understood to be agreement with his report. Having received management's approval, the Sony general manager again communicated Sony's reservations to Sanyo. Sony also suggested that Sanyo obtain opinions from both Sanyo's and Sony's American lawyers on possible

---

[16] MD 932, pp. 8-12; MD 1003, pp. 69-99; MD 1014, p. 111; e.g., MD 920, pp. 123-24; MD 1014, pp. 107-19.

[17] MD 1023, pp. 16-19; MD 1093, pp. 88-90; e.g., MD 960, pp. 116-23.

copyright infringement. Sanyo's lawyer saw no problem; Sony's lawyer hedged. Thereafter, in the fall of 1984, Sanyo abandoned its dual-deck project.[18]

When the Sharp controversy arose in January of 1985, Go-Video was at a crucial stage in its NEC negotiations, which had narrowed to product specifications and terms of sale, including price, delivery, and numbers of units. On January 23 and 25, 1985, officers of Go-Video met with NEC in Japan. Go-Video left the meetings with the understanding that a definitive manufacturing arrangement was imminent, with only final details to be worked out. Believing that Go-Video would be marketing its dual-deck VCR through Sears stores, NEC had directed its negotiators to be flexible on key terms in the discussions.[19]

On January 30, 1985, however, *The Wall Street Journal* carried a prominent feature article in which the MPAA strongly attacked the Sharp dual-deck VCR. The EIAJ and its member companies immediately became aware of the article, which was transmitted from several sources in the United States. Despite MPAA opposition, Sharp stated in the article that it was still considering bringing its dual-deck to the United States.[20]

On January 31, 1985, the EIAJ received a visit from the president of the Japan Video Association ("JVA"), a trade association of Japanese video industry members, including subsidiaries and joint ventures of the American motion picture companies in the MPAA. The JVA, on behalf of the "video industry," asked the EIAJ to convey a request that the VCR makers not produce dual-deck VCRs.[21]

---

[18] MD 942, pp. 70-80, 96-97; MD 1177, pp. 137-44; MD 1193, pp. 12-27; MD 942, pp. 85-87; MD 1177, p. 102; MD 942, pp. 82-87; MD 1177, pp. 144-45; PX 698; DX 5047; MD 1177, pp. 107-08.

[19] e.g., MD 1047, pp. 54-79; e.g., MD 1047, pp. 69-77; MD 1016, pp. 49-53.

[20] e.g., MD 932, pp. 21-25, 90; MD 1047, p. 116.

[21] MD 1023, pp. 103-06; PX 605; PX 605-YK; PX 605B-605J; MD 1023, pp. 106-09.

On January 31, 1985, because of the *Wall Street Journal* article, Go-Video wrote Sharp advising of Go-Video's pending dual-deck patent application. In a reply dated February 5, 1985, Sharp asked Go-Video to specify how Go-Video's United States patent claims covered Sharp's dual-deck.[22]

Also on February 5, 1985, however, the EIAJ communicated the JVA's message at a meeting of the video business committee. The Sony representative reported on the meeting to his superiors:

> It was reported that Japan Video Association had requested the following to the EIAJ secretariat with regard to the video double cassette problem and the following is the request.
>
> * * *
>
> It is a serious problem for video soft makers if the video double cassette appears.
>
> * * *
>
> Is it true that Sharp had started selling this product?
>
> To this, member of Sharp, who was attending at that meeting, stated that Sharp had sold the product the previous year in the Middle East (Saudi Arabia and Kuwait) so "sold" means restricted sales in this area.
>
> However, it does not have any intention of selling to Europe, United States and Japan.
>
> He also stated that Sharp is sorry or apologize for the inconvenience suffered by other companies in the industry. He also stated that Sharp planned to go to MITI on the very day, which is February 5, in the afternoon, to explain the circumstances.

When the Sharp representative apologized, he stood and "bowed down" to the other companies. The Sharp apology and

---

[22] MD 1016, pp. 56-68.

bow were a request to be forgiven and not excluded for acting independently from the group. The Sony representative's superiors wrote on his report, "important."[23]

At the February 5 meeting were Matsushita, JVC, Sony, Mitsubishi, Sanyo, Hitachi, Toshiba, Sharp, Akai, NEC, and Funai. On Funai's copy of the minutes was a handwritten notation, "Requested Mr. Tamura to inform all related persons." Mr. Tamura attended for NEC, which was then in negotiations with Go-Video.[24]

The following day, February 6, 1985, the EIAJ overseas copyright committee had a similar discussion. A Matsushita representative, Mr. Hayashi, confronted Sharp. Mr. Hayashi contended that if Sharp introduced its dual-deck VCR to the United States, Congress might revive the royalty legislation. Sharp again responded that it would not sell the product in the United States, Europe, or Japan. An EIAJ official then cautioned the members to stop the discussion because of United States and Japanese antitrust laws.[25]

On February 14, 1985, NEC began withdrawing from its negotiations with Go-Video during a telephone discussion with a Japanese trading company acting for Go-Video. NEC notes of the call ask, "If NEC should proceed after checking the situation of other company proceeding with the double-deck cassette." In an internal NEC memo that day, the video general manager directed, "Say 'No' due to the copyright issue." Go-Video had previously offered indemnification against any copyright infringement suits.[26]

---

[23] MD 920, pp. 38-40; MD 920, p. 43; MD 1090, pp. 57-60; PX 865, PX 865-YK.

[24] MD 1014, pp. 40, 128-32; PX 604, PX 604-YK; MD 1014, pp. 127-28.

[25] MD 920, pp. 130-36; MD 932, p. 102; MD 920, pp. 134-35; MD 932, pp. 92-93.

[26] MD 1047, pp. 102-05; PX 843; PX 843-YK; MD 1047, pp. 91-108; MD 1047, pp. 109-10.

During the next two weeks, NEC had another telephone call with Go-Video's Japanese negotiator in which the negotiations were finally terminated. On February 22, 1985, Go-Video wrote Sharp to suggest a licensing arrangement. Sharp never responded.[27]

On February 28, 1985, the JVA again visited the EIAJ, this time to deliver a written request not to make dual-deck VCRs. The EIAJ sent the request to the member companies' representatives on the domestic copyright committee. Each company received the request, knowing that it invited an agreement not to produce dual-deck VCRs and had been sent to the others. After receiving it, no company objected, responded that it would not comply, or marketed a consumer dual-deck VCR in the United States.[28]

On March 29, 1985, the EIAJ again distributed the request, this time to the video business committee. The same companies that were present on February 5 attended on March 29. When the request was discussed, no one voiced opposition.[29]

In May of 1986, a Korean manufacturer, Samsung, announced that it would display a VHS-eight millimeter dual-deck VCR at the June consumer electronics show ("CES") in Chicago. Again, the MPAA began a media campaign in opposition. Again, the Japanese VCR makers received copies of American newspaper articles, as well as reports from the EIA, about the MPAA's stance against the dual-deck. Again, they believed that introduction of the machine could create the same danger of royalty legislation as was posed by the Sharp machine.[30]

---

[27]MD 1047, pp. 108-10; PX 993; MD 1016, pp. 70-72.

[28]e.g., MD 997, pp. 9-20; MD 1117, p. 194.

[29]e.g., MD 920, pp. 57-68; MD 997, pp. 19-21; PX 683; PX 683-YK; PX 683B-683I.

[30]MD 1090, pp. 150-52; e.g., MD 1003, pp. 100-23; MD 1014, pp. 124-27.

The EIA then joined the MPAA in efforts to block the Samsung dual-deck. On May 27, 1986, the EIA phoned Samsung with a warning not to proceed, because the machine might hinder MPAA plans to develop the eight millimeter video format for itself. On June 27, 1986, after Samsung had shown the dual-deck at the CES, the EIA wrote Samsung about the adverse impact the dual-deck would have on efforts to block royalty legislation. The EIA sent a blind copy of the letter to the EIAJ, which distributed the letter to its members. In early August, 1986, Samsung publicly announced that it would not proceed. One of its concerns was potential adverse reaction by the EIAJ.[31]

In late August, 1986, the EIA's general counsel met with the MPAA's vice president for home video. The EIA general counsel stated, "The VCR manufacturers would very much like to introduce the dual-cassette VCR," and "would agree that such VCRs could include circuitry designed to prevent copying" of pre-encoded tapes. The MPAA vice president responded that there were already 100 million prerecorded video cassettes in circulation "that didn't have any pre-encoding." The EIA general counsel then "said that he would be willing then to discuss the possibility of a timetable, a later introduction of the dual-cassette VCRs in 1991 or 1992 on the basis that at that time all the older non pre-encoded cassettes . . . would probably be out of the market." The EIA general counsel prepared a memo of this conversation, which was provided to the EIAJ.[32]

In December of 1986, unable to find a manufacturer for its dual-deck, Go-Video announced that it would display a prototype of the VCR-2 at the January, 1987 CES in Las Vegas. The EIA, learning of Go-Video's plans, called the MPAA, asked,

---

[31] MD 1042, pp. 109-15; MD 1042, pp. 118-21, 142-45; e.g., MD 1003, pp. 121-23; PX 771; MD 1042, pp. 139-40.

[32] MD 1093, p. 27; MD 1093, p. 28; MD 1042, pp. 38-42; PX 458.

"What are you guys going to do about Go-Video?", and forwarded information about Go-Video to the MPAA. The EIAJ and its members also obtained copies of this material.[33]

As with Sharp and Samsung, the MPAA again used the media to announce its opposition to Go-Video's dual-deck; the EIAJ and its members were informed of these developments; and the EIA advised Go-Video that its dual-deck would create problems for the industry if introduced. At the January, 1987 CES, Go-Video unsuccessfully tried to reopen discussions with NEC. Go-Video thereafter was unable to elicit interest from any other potential manufacturer.[34]

Only after filing suit was Go-Video able to find a manufacturer. Until its arrangement with Samsung, Go-Video was unsuccessful in its efforts, which included direct contacts with Sony, and extensive indirect efforts through foreign agents reputed to have connections with the Japanese electronics industry. Go-Video also made unsuccessful approaches through United States government officials, including the United States Trade Representative and Arizona Senators and Congressmen.[35]

In addition to the above evidence received at trial, the district court excluded from trial substantial portions of Go-Video's evidence.[36]

---

[33]MD 1090, pp. 158-59; MD 1093, pp. 29-30, 69; PX 888; MD 1162, pp. 75-76.

[34]MD 1018, pp. 31-33; MD 1162, pp. 75-76; PX 888; MD 1090, pp. 126-32; MD 1018, p. 29.

[35]MD 1016, pp. 37-43; 75-81; MD 1016, pp. 86-90.

[36]Prior to and during trial, the court excluded, *inter alia*, the following substantial portions of Go-Video's evidence:

a. Newspaper Reports of the Conspiracy

On February 27, 1985, *Dempa Shimbun*, a widely read Japanese trade journal, reported, "According to the information given by the home electric appliances industry on February 26, the respective VTR manufacturers decided to self-restrain from manufacturing and selling the W-Deck [double-deck] type products for the time being." On March 29, 1985, another trade newspaper, *Nikkei Sangyo*, in an expanded account, described the arrangement as a "gentlemen's agreement," because a formal agreement would raise problems under antitrust

2. *The Trial Court's Jury Instructions*

Over objection from Go-Video, the trial court gave the following jury instructions:

---

laws. These articles were found in the files of the Japanese VCR makers, who admitted that they were aware of the reports, which had been disseminated to them by the EIAJ. The copies of the *Nikkei Sangyo* article in the files of the EIAJ, Matsushita, and JVC all had the "gentlemen's agreement" language underlined. (MD 977, pp. 40-42; E 243; E 605-08; E 418-19; E 609-16; E 233; E 235-37; E 242-43; E 245-46; E 248-50; E 252; E 254-57; E 258; E 260-62; E 272; E 278-81; E 285-86; E 418-19; E 609-16.)

At the time of the Samsung dual-deck in 1986, an article reporting the conspiracy appeared in the *Washington Post*. The Japanese VCR makers discussed this article at the EIAJ, and agreed to make no public statements concerning it. (E 264-73; E 275-77; E 565-66.) The trial court excluded this evidence as hearsay and as unduly prejudicial under Fed. R. Evid. 403.

b. MPAA Admissions and Evidence Concerning the Conspiracy

The MPAA intended to use the media to signal its opposition to the dual-deck to the Japanese VCR makers. The membership of the JVA, which approached the EIAJ, included subsidiaries and joint ventures of American motion picture companies. On March 8, 1985, after the two February EIAJ committee meetings, the MPAA's vice president for home video informed Jack Valenti, president of the MPAA, "... it now appears pretty obvious the Japanese VCR manufacturers have reached agreement not to manufacture or market NTSC models [of dual-deck VCRs] in either the U.S. or Japan." On March 12, 1985, a Warner Communications vice president wrote to Mr. Valenti that the EIA had conveyed "the clear impression that a conscious policy decision had been reached" not to make dual-deck VCRs. On March 14, 1985, an internal Warner memo reported that Warner had "... learned that the Japanese electronics association agreed to total ban on manufacture of dual deck machine ..." In April and May of 1985, in an MPAA Home Video News Digest, the MPAA reported that the Japanese VCR makers had agreed not to market dual-deck VCRs. On April 29, 1985, the MPAA issued a briefing paper for members of Congress reporting the agreement. (E 329; E 356-59; E 568; E 379; E 381-86; E 569; E 369; E 376-78; E 601; E 570-77; E 394; E 413-16; E 578; E 288-95; E 328-30; E 333-45; E 354-55; E 361-63; E 371-75.)

When the Samsung dual-deck appeared in 1986, the MPAA again repeatedly stated, publicly and privately, that the Japanese VCR makers had agreed not to produce dual-deck VCRs. A draft letter to South Korea's ambassador to the United States, dated May 27, 1986, stated, "The Electronic Industries Association of Japan interceded and secured a [redaction] 'voluntary restraint' under which Japanese VCR manufacturers agreed not to market any more dual-cassette [redaction] machines." The MPAA told the *Washington Post*, which reported the statements on June 4, 1986, "... in the face of MPAA pressure, the Electronics Industries Association of Japan last year got a 'voluntary restraint agreement' among its VCR manufacturers not to ship any such machines to any country where 'the question of copyright would be a major hurdle.'" (E 329; E 364-65; E 579-82; E 328-29; E 331; E 346-49; E 352; E 366-67; E 565-66.)

Later, having learned from the EIA of Go-Video's dual-deck, the MPAA again made repeated public admissions of the dual-deck agreement, which the MPAA said would prevent Go-Video from finding a manufacturer. For exam-

a. *Trade Associations*

As I mentioned, there are many examples of the ways in which competitors can lawfully cooperate through trade associations. Programs which seek to standardize or certify products to enhance safety or promote uniformity for the benefit of consumers are reasonable. Cooperation that seeks to promote research and development of new products, joint marketing, and bargaining activity by trade associations is allowed.[37]

---

ple, the MPAA told the *Greater Phoenix Business Journal* that, "There were some sort of agreements that were reached so that the industry in Japan and Korea were no longer manufacturing these dual-deck VCRs." (E 393-94; E 396-411; E 567; E 699.) The trial court excluded this evidence on the ground that, as a matter of law, the MPAA and its members were not co-conspirators with defendants.

c. The Round Table—Limits on Time and Subject Matter

The court placed temporal and subject matter restrictions on both Go-Video's discovery and its trial evidence. The court limited the subject matter of Go-Video's discovery and proof to dual-deck VCRs, and prohibited discovery and proof with regard to other consumer electronics products, including even single-deck VCRs, or meetings concerning these other products. The sole exception was that the court permitted Go-Video "to introduce only evidence of the fact, regularity and frequency of any of these meetings that occurred within two years of the time during which plaintiff contends the dual-deck VCR conspiracy was formed and 'cemented,' " *i.e.*, 1983-87. (E 1-6; E 185.)

Go-Video, therefore, could not discover or present evidence of defendants' single-deck VCR business, including prices, production, costs, or royalty rates and revenues from licensing, or evidence of defendants' meetings and agreements on single-deck VCR pricing, output, or licensing. Go-Video was also prevented from discovering or offering evidence of other products complementary or analogous to dual-deck VCRs, such as dual-deck audio equipment, camcorders, and televisions. (E 1-6; E 185.)

The court also excluded, as irrelevant, evidence of the substance of Japan-EC Round Table meetings in 1985-86, where top executives of Japanese and European electronics companies, including defendants, presented speeches and papers stating that, notwithstanding legal impediments, they would jointly develop new standardized products; they would establish a single format for play and recording equipment for video, audio, and data products; they would coordinate the implementation of these standards, so as to assure that all companies were ready, existing markets were fully exploited, and diversity and competition between formats would not develop; they would not introduce new hardware products until they were assured of software cooperation; they would collaborate specifically on digital audio tape equipment, high definition television, satellites, and all other major emerging technologies; and any competition among them would come only after they had all introduced new standardized products. (E 296; E 623-97.)

[1] MD 1197, pp. 110-11; MD 1199, pp. 25-26; MD 1203, pp. 32-33; E 454-55; E 462-63; E 467-68.

b. ***Circumstantial Evidence***

A conspiracy may be proved by direct or circumstantial evidence that reasonably tends to prove that the defendants "had a conscious commitment to a common scheme designed to achieve an unlawful objective." The antitrust laws, however, impose certain requirements with regard to the reliability and quality of the evidence by which such a conspiracy can be established.... The plaintiff has relied on circumstantial evidence to prove the existence of a conspiracy among defendants, and you must be careful what inferences to draw from that evidence.[38]

REASONS FOR GRANTING THE PETITION[39]

Certiorari Should Be Granted Because the Ninth Circuit's Decision Permits Jury Instructions Directly Contravening a Century of This Court's Antitrust Jurisprudence

For a hundred years, and through a long line of decisions, this Court has made clear that plaintiffs in antitrust conspiracy cases can prove a conspiracy through circumstantial evidence, such as by showing parallel conduct and certain "plus factors." Frequent meetings of competitors are to be considered plus factors. Since in most antitrust cases the plaintiff can prove a conspiracy only through circumstantial evidence, a trial court's instructions to the jury regarding the weight to be given such factors becomes crucial to the effective private enforcement of the antitrust laws.

Where, as in this case, the trial court instructs the jury that plus factors, such as meetings and even agreements among competitors to standardize products, are not only not plus factors but

---

[38]MD 1197, pp. 104-06; MD 1199, pp. 21; MD 1203, p. 27; E 451-53; E 461; E 466.

[39]Although the issue is not yet ripe for review, this Court should be aware that Go-Video has challenged the judgment in this action as tainted by fraud. Respondents defended against Go-Video's allegations that they had conspired not to market dual-deck VCRs and collusively refused to deal with Go-Video by claiming at trial that respondents have never had any interest in marketing any kind of dual-deck VCR. After trial, however, Matsushita and Sony introduced dual-deck VCRs in Japan. These products were being developed at the time Matsushita and Sony representatives testified at trial that their companies had no interest in dual-deck VCRs.

per se lawful, private enforcement of the antitrust laws becomes impermissibly difficult. Moreover, by admonishing the jury to exercise special care when considering circumstantial evidence of an antitrust conspiracy, the trial court contravened the well established rule that circumstantial evidence and so-called direct evidence are of equal weight. In sum, the trial court's jury instructions eviscerated Go-Video's case and contravened one hundred years of this Court's precedents.

The conspiracy charged in this case was largely implemented through trade associations, including the EIAJ, EIA, JVA, and MPAA. Much of Go-Video's evidence focused on trade association activities and meetings, such as the EIAJ video business committee meetings of February 5 and March 29, 1985, and the overseas copyright committee meeting of February 6, 1985. A major theme of Go-Video's proof was that the Japanese VCR makers organized, monitored, and regimented their entire industry through the EIAJ, which was here used to suppress the dual-deck VCR.

Under these circumstances, the trial court's jury instructions on the antitrust legality of trade association activities were crucial. The court, however, instructed the jury that the defendants' trade association activities were generally *per se lawful*, including "[p]rograms which seek to standardize or certify products to . . . promote uniformity for the benefit of consumers," "[c]ooperation that seeks to promote research and development of new products, joint marketing, and bargaining activity by trade associations."[40]

These instructions misstated the law. They were prejudicial and reversible error, directly contrary to numerous decisions of this Court. *Allied Tube & Conduit Corp. v. Indian Head*, 486 U.S. 492, 500-04 (1988); *National Society of Professional Engineers v. United States*, 435 U.S. 679, 693-96 (1978); *American*

---

[40] E 454-55; E 462-63; E 467-68.

Society of Mechanical Engineers v. Hydrolevel Corp., 456 U.S. 556, 571 (1982); *Radiant Burners v. Peoples Gas Lgt. & Coke Co.*, 364 U.S. 656, 658-60 (1961); *Fashion Originators' Guild v. FTC*, 312 U.S. 457, 464-66 (1941); *American Column & Lumber Co. v. United States*, 257 U.S. 377, 409-11 (1921); *United States v. Container Corp. of America*, 393 U.S. 333 (1969); see, *United States v. United States Gypsum Co.*, 438 U.S. 422, 441 n.16 (1978); *FTC v. Indiana Federation of Dentists*, 476 U.S. 447, 459-63 (1986).

This Court has held in the above cases that while the use of trade associations to effectuate product standardization and the exchange of pricing and other information may not always be *per se unlawful*, such activities more often than not transgress the antitrust laws, in that they have as their natural tendency the restraint of free competition. To rule that these activities are *per se lawful*, as did the trial court in this case, is flatly wrong and entirely contrary to a century of this Court's precedents.

Indeed, in 1988 this Court rejected any type of *per se* legal treatment for trade association activities, and described their propensity for illegal restraints of trade:

> There is no doubt that the members of such associations often have economic incentives to restrain competition and that the product standards set by such associations have a serious potential for anticompetitive harm. [Citation omitted.] Agreement on a product standard is, after all, implicitly an agreement not to manufacture, distribute, or purchase certain types of products. Accordingly, private standard-setting associations have traditionally been objects of antitrust scrutiny.

Allied Tube v. Indian Head, 486 U.S. at 500. In *National Society of Professional Engineers*, 435 U.S. at 695-96, this Court flatly rejected any notion that standard-setting by trade associations to promote product safety and consumer welfare is lawful in and of itself. As this Court observed in the *Hydrolevel* case,

456 U.S. at 571, "a standard-setting organization . . . can be rife with opportunities for anticompetitive activity."

Yet the trial court in its instructions expressly conferred the very immunity and *per se* legality that this Court has refused to recognize. What should have been a "plus factor" in establishing the conspiracy became instead a shield and a badge of innocence. These instructions were devastating to Go-Video's case. Such a gross misstatement of the law was reversible error.

The Ninth Circuit recognized that the jury instructions included incorrect statements of the law:

> The above-quoted instruction, by itself, could mislead the jury because it indicates that all such activities of trade organizations are generally legal. That is not the law. Depending on the circumstances, such activities might not survive rule of reason analysis.

(Oct. 9, 1992, Memo., p. 13.)

Instead of reversing the decision based on such error, however, the Ninth Circuit affirmed the trial court's erroneous decision by concluding that the incorrect statements of the law were remedied by arguably correct statements of the law in other parts of the jury instructions. The court of appeals thus failed to observe the proper standard of review and in effect established new, incorrect principles of law that impermissibly burden plaintiffs in antitrust conspiracy cases.

Similarly, the law has long recognized that conspiracies often, if not usually, must be proved by circumstantial evidence; and that juries may give equal weight to circumstantial proof of a conspiracy as to so-called direct proof. *American Tobacco Co. v. United States*, 328 U.S. 781, 809-10 (1946); *Lawlor v. Loewe*, 209 F. 721, 725 (2d Cir. 1913); *United States v. Vega*, 860 F.2d 779, 793 (7th Cir. 1988); *United States v. Towers*, 775 F.2d 184, 188 (7th Cir. 1985); *United States v. Bowles*, 428 F.2d 592, 597 (2d Cir. 1970) (". . . circumstantial evidence is of no less probative value than testimonial evidence."); *United States v. Glasser*, 443 F.2d 994, 1007 (2d Cir. 1991); *C-O-Two Fire*

Equipment v. United States, 197 F.2d at 494 ("It is, we think, well established that the proof and evidence in an anti-trust conspiracy case is, in most cases, circumstantial. Proof of a formal agreement is unnecessary, and were the law otherwise such conspiracies would flourish; profit, rather than punishment, would be the reward."); *Esco Corp. v. United States*, 340 F.2d 1000, 1007-08 (9th Cir. 1965); *see, Holland v. United States*, 348 U.S. 121, 139-40 (1954).

In its instructions at trial, however, the court told the jury, "In this case, the plaintiff has relied on circumstantial evidence to prove the existence of a conspiracy among defendants, and you must be careful what inferences to draw from that evidence." This was error. Whatever admonitions exist in the case law concerning inferences to be drawn from circumstantial evidence are admonitions not to juries, but to courts in deciding what evidence may properly be submitted to juries. *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984); *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 593-94 (1986); *In re Coordinated Pretrial Proceedings*, 906 F.2d at 438-39. Once the court has determined that evidence may properly be considered by the jury, as occurred here when the court denied defendants' motions for summary judgment, no authority exists for instructing the jury that its scrutiny of circumstantial evidence must be more "careful" than its scrutiny of so-called direct evidence. To give such an instruction improperly eviscerated the force of Go-Video's proof and was error.[41]

These instructions by the trial court render proof of conspiracies in private antitrust cases impermissibly difficult, and threaten to block effective private enforcement of the antitrust laws, particularly against far reaching, wide-ranging conspiracies, such as that of the Japanese consumer electronics products manufacturers. Although jury instructions are to be taken as a

---

[41] E 451-53; E 461; E 466.

whole, an incorrect statement of the law is not cured by a correct statement of the law appearing elsewhere in the instructions. The trial court is not free to present conflicting and erroneous statements of the law to the jury, which may be misled by the incorrect statement of the law.

That the court of appeals affirmed the district court's decision only magnifies the error. By affirming the district court's erroneous jury instructions, the Ninth Circuit allowed lower courts to contravene this Court's precedents and undermine private enforcement of the antitrust laws. Certiorari should be granted so that effective private enforcement of the antitrust laws is not eviscerated.

CONCLUSION

For the reasons stated hereinabove, petitioner respectfully requests that this Court grant its petition for a Writ of Certiorari.

Dated this 18th day of June, 1993.

Respectfully submitted,
LAW OFFICES OF
DANIEL R. SHULMAN, P.A.
LAW OFFICES OF JOSEPH M. ALIOTO

Counsel for Petitioner
Daniel R. Shulman
Joseph M. Alioto

APPENDIX

INDEX TO APPENDIX

Title	Page
May 30, 1991, Final Judgment by the United States District Court for the District of Arizona	A-1
April 23, 1992 Order of the United States Court of Appeals for the Ninth Circuit Denying Appellant's Motion to Remand to the District Court	B-1
October 9, 1992, Memorandum Opinion of the United States Court of Appeals for the Ninth Circuit	C-1
March 22, 1993 Order of the United States Court of Appeals for the Ninth Circuit Denying Petitioner's Motion to Vacate Decision and to Remand, and Denying a Petition for Rehearing En Banc	D-1
Statutes Involved:	
Sherman Antitrust Act, § 1, 26 Stat. 209, as amended, 15 U.S.C. § 1 (1988)	E-1

Appendix A

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

GO-VIDEO, INC.,
An Arizona corporation,

Plaintiff,

v.

MATSUSHITA ELECTRIC
INDUSTRIAL CO., LTD., et al.,

Defendants.

JUDGMENT IN A CIVIL CASE
Case Number: MDL 765
(CIV-87-987-PHX-RCB)

☒ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☐ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED there was not an agreement, combination, or conspiracy not to make for or sell to others a dual-deck VCR or sell parts for manufacturing a dual-deck VCR for sale in the United States.

FURTHER ORDERED AND ADJUDGED granting defendants' oral motion to dismiss Second Amended Complaint with prejudice and for costs consistent with the jury verdict.

FURTHER ORDERED AND ADJUDGED granting defendants' oral motion for a sixty day extension of time to file a bill of costs.

Dated: May 31, 1991

Richard H. Weare
Clerk

/s/Charles D. Evans
(By) Deputy Clerk

Appendix B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GO-VIDEO, INC.,
an Arizona corporation,

Plaintiff-Appellant,

vs.

THE MOTION PICTURE
ASSOCIATION OF AMERICA,

Defendant,

and

MATSUSHITA ELECTRICAL
INDUSTRIAL CO., LTD., et al.,

Defendants-Appellees.

Filed Apr. 23, 1992, Cathy A. Catterson, Clerk, U.S. Court of Appeals

No. 91-16039
D.C. # CV-87-00987-RCB Arizona (Phoenix)

ORDER

Before: FARRIS and TROTT, Circuit Judges

The district court has not indicated a willingness to entertain reconsideration in this matter. Accordingly, appellant's motion to remand to the district court is denied. *See Crateo, Inc. v. Intermark, Inc.*, 536 F. 2d 862 (9th Cir.), *cert. denied*, 429 U.S. 896 (1976).

Appendix C
Not for Publication

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GO-VIDEO, INC.,
an Arizona corporation,

Plaintiff-Appellant,

v.

THE MOTION PICTURE
ASSOCIATION OF AMERICA,

Defendant,

and

MATSUSHITA ELECTRICAL
INDUSTRIAL CO., LTD.;
VICTOR COMPANY OF
JAPAN, LTD.;
SONY CORPORATION,

Defendants-Appellees.

Filed Oct. 9, 1992, Cathy A. Catterson, Clerk, U.S. Court of Appeals

No. 91-16039
D.C. No. CV-87-00987-RCB

MEMORANDUM*

Appeal from the United States District Court
for the District of Arizona
Robert C. Broomfield, District Judge, Presiding

Argued and Submitted August 20, 1992
San Francisco, California

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

Before: WIGGINS, O'SCANNLAIN and FERNANDEZ, Circuit Judges.

Go-Video appeals from the district court's judgment against it in this Sherman Act Section 1 antitrust case. We affirm.

I

Go-Video holds a United States patent for a dual-deck video cassette recorder (VCR). To market its VCR, Go-Video had to negotiate a deal with the manufacturing defendants (appellees here) or their licensees because they control basic VCR patents. Although Go-Video commenced efforts to introduce its VCR during 1984, it did not obtain a supplier until June 1987. Go-Video brought suit against multiple parties, alleging that the delay in its marketing efforts was due to a conspiracy, in violation of Section 1 of the Sherman Act, to prevent the introduction of dual-deck VCRs into the United States and to refuse to deal with anyone attempting to do so.

Appellees and other electronics manufacturers belong to various trade associations. Such trade associations include the Electronic Industries Association of Japan (the "EIAJ"), which is a trade association of Japanese electronics industry members, the Electronic Industries Association ("EIA"), which is an American counterpart to the EIAJ, and the Japan Video Association ("JVA"), which is a trade organization of Japanese video industry members.

The Motion Picture Association of America ("MPAA"), composed of United States film industry members, is another trade association involved in this case (an original defendant but not an appellee). Prior to the time that Go-Video sought to produce its dual-deck VCR, members of the MPAA unsuccessfully sued Sony in *Universal City Studios, Inc. v. Sony Corp.*, 659

F.2d 963 (9th Cir. 1981), *rev'd*, 464 U.S. 417 (1984) (the "*Betamax*" case), over production of a basic VCR that could copy television programs. The Supreme Court held that such activity did not violate copyright laws. While the *Betmax* case was pending, the MPAA tried to obtain legislation placing a royalty on VCR hardware and software.

Dual-deck VCRs have the ability to copy from one cassette to another. This fact prompted the MPAA to oppose such VCRs, again due to copyright concerns, whenever a company appeared about to introduce a version into the market.

According to Go-Video, the MPAA invited and caused the alleged conspiracy to be formed through critical media campaigns and through use of co-conspirators and intermediaries such as the EIA and JVA. Furthermore, according to Go-Video, the threat of litigation or royalty legislation by the MPAA caused the appellees to use EIAJ and other meetings to conspire against Go-Video and to further the worldwide conspiracy alleged among all original defendants.

Trial commenced April 2, 1991 before a jury in Phoenix, Arizona. The case was submitted to the jury on May 30, 1991. A special verdict form posed ten questions, the first of which was whether appellees had conspired to withhold dual-decks from the United States. If that question was answered in the negative, the jury was not to address the remaining questions. The jury answered in the negative, so judgment was entered for appellees on May 31, 1991, by the district court. This timely appeal followed. We have jurisdiction under 28 U.S.C. § 1291.

II

Go-Video asserts that the district court erred in numerous ways. Go-Video alleges four faulty evidentiary rulings, three faulty jury instructions, and one faulty pretrial imposition of

time limits, all of which Go-Video claims are grounds for reversal.

III

As a general rule, we review evidentiary rulings for an abuse of discretion and will not reverse absent some prejudice. *Roberts v. College of the Desert*, 870 F.2d 1411, 1418 (9th Cir. 1988). Prejudice justifying reversal means that, more probably than not, the error tainted the verdict. *Kisor v. Johns-Manville Corp.*, 783 F.2d 1337, 1340 (9th Cir. 1986). The correct standard is unclear, however, regarding admission of statements of alleged co-conspirators.

A

Certain newspaper articles asserted the existence of the alleged conspiracy. The district court excluded the articles as inadmissible hearsay and as unfairly prejudicial under Rule 403 of the Federal Rules of Evidence.

Go-Video argues that the articles were the means by which the conspirators implemented and kept themselves informed of the conspiracy, so the articles should have been admissible to prove that fact, as well as knowledge and intent. Go-Video argues that exclusion of the evidence was prejudicial: Due to the news articles, the existence of the conspiracy was well known to all involved, but the jury found no conspiracy because it was kept ignorant.

Appellees counter that the articles would be highly prejudicial to them if admitted because they "reported" the existence of the alleged conspiracy, i.e., the very issue the jury was being asked to decide.

The district court expressly found that the articles were hearsay, with no relevant exception. Therefore, the district court implicitly found, as appellees claim, that the articles were being

offered for the truth of their content. The district court also found that Rule 403 prevented admission of the evidence in any event. Even if the district court erred in finding hearsay, such error would be harmless if this court defers to the district court's Rule 403 ruling.

This court gives great deference to a trial court's Rule 403 balancing. *Rogers v. Raymark Industries, Inc.*, 922 F.2d 1426, 1430 (9th Cir. 1991). The Ninth Circuit recognizes that trial courts are in a much better position to sense the dynamics of a trial and to examine surrounding facts and circumstances than are courts of appeals. *See, e.g., R.B. Matthews v. Transamerica Transp. Servs.*, 945 F.2d 269 (9th Cir. 1991). In sum, a party faces a heavy burden in overcoming evidentiary rulings that involve Rule 403 balancing. Given the damning picture of the newspaper evidence, we cannot conclude that the district court erred.

The district court did not abuse its discretion by excluding the articles from evidence.

B

MPAA members made various statements in 1985 and 1986 to the effect that the Japanese VCR industry agreed not to introduce dual-deck VCRs into either the United States or Japan.

Go-Video asserts that the district court erred by ruling that the MPAA could not, as a matter of law, be a co-conspirator, and then ruling that the MPAA's statements were, therefore, inadmissible hearsay. Go-Video cites liberal rules relating to evidence upon which a proponent may rely to prove participation in a conspiracy. Go-Video then cites liberal rules rendering statements of co-conspirators admissible. Finally, Go-Video recounts facts that, it claims, overwhelmingly link the MPAA to the alleged conspiracy. Go-Video concludes that the MPAA statements should have been admitted under Rule 801(d)(2)(E).

Appellees contend that the MPAA statements were properly excluded on hearsay grounds.

To get the MPAA statements admitted under Rule 801(d)(2)(E), Go-Video was required to prove to the district court, by a preponderance of evidence, the existence of the conspiracy and the MPAA's involvement in it. *Bourjaily v. United States*, 483 U.S. 171, 175-76 (1987); *United States v. Tamez*, 941 F.2d 770, 775 (9th Cir. 1991). Go-Video asserts that the evidence it presented was "overwhelming" in this regard. Appellees assert, and the district court found, to the contrary, that Go-Video did not meet its burden.[1]

We are persuaded that the district court's interpretation of the evidence (that the MPAA articles were permissible lobbying and warning activities) is at least as reasonable as Go-Video's interpretation (the articles show that the MPAA invited and caused the conspiracy through a media compaign intended to communicate with Japanese VCR makers). We conclude that the district court did not clearly err in concluding that Go-Video failed to prove both the existence of the conspiracy and the MPAA's involvement in it.

The district court certainly did not abuse its discretion by excluding the MPAA statements.

C

The district court placed certain time period and subject matter limitations on evidence it would allow Go-Video to introduce

[1]Go-Video claims that the standard of review for this issue is abuse of discretion. Appellees claim that this court can reverse only for "clear error." The correct standard is unclear. Defendants cite *United States v. Torres*, 908 F.2d 1417, 1424 (9th Cir.), *cert. denied*, 111 S. Ct. 366 (1990), for the "clear error" standard. This court, in fact, used the clear error standard in that case. Later, however, in *Tamez*, 941 F.2d at 775, this court did not follow *Torres*, but stated: "The standard we use to review a district court's decision to admit 801(d)(2)(E) statements pursuant to *Bourjaily* is not settled." This court did not resolve the appropriate standard in *Tamez* because it found the co-conspirator statements to be properly admitted under either the de novo or clear error standard. In this appeal as well, even if we review this issue de novo rather than for clear error or abuse of discretion, the result would be the same.

at trial relating to meetings of various trade associations. Go-Video sought to introduce evidence of numerous meetings which occurred outside the limited period, and claims that the limitations impermissibly confined and compartmentalized its proof relating to alleged conspiracies involving products other than dual-deck VCRs.

Appellees cite several cases for the proposition that evidence of conspiracies other than a dual-deck conspiracy, even if proven, can have little relevance of probative value. However, they misleadingly quote or paraphrase the case on which they rely. For example, in *Matsushita Electrical Industrial Co. v. Zenith Radio*, 475 U.S. 574, 595 (1986), the Court emphasized that it was talking about conspiracies of a different *nature* (e.g., "a combination to increase profits in one market does not tend to show a combination to sustain losses in another") when it concluded that evidence supporting those collateral conspiracies "said little" about an alleged predatory pricing conspiracy.

Obviously, an electronics manufacturer or industry group that produces single-deck VCRs, dual-deck audio equipment, camcorders, and televisions, as well as producing or potentially producing dual-deck VCRs might have general policies with regard to marketing all their products. Marketing performance and policies relating past, similar products would, therefore, arguably be relevant and probative if, as Go-Video claims, it wants such evidence to show that the dual-deck conspiracy was part and in furtherance of a broader, pre-existing conspiracy to monopolize and restrain trade in consumer products generally and on a worldwide basis.

Nevertheless, we cannot conclude that the district court erred. After considering the relevance and potential prejudice of the evidence, the district court issued an order allowing Go-Video to introduce only evidence relating to meetings that occurred within two years of the time during which Go-Video

contended the dual-deck VCR conspiracy was formed and "cemented," i.e., February-March 1985. However, the order allowed Go-Video to introduce evidence of meetings occurring outside that timeframe if Go-Video could identify aspects of the meeting that would make it relevant to specific issues in this case.

The order, therefore, did not limit Go-Video's evidence to the 1983-87 period, as Go-Video claims. The order allowed Go-Video to introduce evidence of meetings occurring outside the specified timeframe if Go-Video could identify relevant aspects of the meetings. What makes the ruling potentially limiting is that, even during the 1983-87 timeframe, the order would "in general allow plaintiff to introduce only evidence of the fact, regularity and frequency of any of these meetings." We note, however, that the meetings to which the ruling refers apparently did not include meetings at which dual-deck VCRs were discussed. Go-Video concurs with this interpretation: "Substantively, except for simply the fact and frequency of meetings, Go-Video could present evidence only with respect to meetings at which dual-deck VCRs were discussed." Appellant's brief at 36-37.

We conclude that the order was not so limiting as to constitute an abuse of the district court's discretion.

D

Go-Video claims that the district court erred by excluding a settlement agreement with former defending Samsung.

Appellees introduced evidence that Samsung was producing a dual-deck VCR for Go-Video. Go-Video tried to introduce evidence that Samsung was producing the VCR as part of the settlement agreement. The district court rejected the evidence on Rule 408 grounds.

According to Go-Video, appellees emphasized to the jury that the Samsung-made dual-deck VCR was unsuccessful. Go-Video claims it was entitled to counter this by showing that problems with the Samsung-made product could be attributed to the fact that Samsung was forced to make it. Go-Video claims that, more importantly, the evidence necessarily conveyed a misimpression to the jury that there was no conspiracy (since Samsung was making a dual-deck VCR). Go-Video concludes that it was entitled to introduce the settlement evidence in order to counter this misimpression.

Rule 408 provides that settlement evidence is not admissible "to prove liability for or invalidity of the claim or its amount." However, the rule "does not require exclusion when the evidence is offered for another purpose. . . ." *Brocklesby v. United States*, 767 F.2d 1288, 1292 (9th Cir. 1985), *cert. denied*, 474 U.S. 1101 (1986).

The district court recognized that the existence of the Samsung-made VCR might negatively influence the jury. In its pretrial order concerning the settlement evidence, the court wrote:

> The court considers the Samsung agreement relevant to issues concerning the existence of a conspiracy. *Jurors would be less likely to believe a conspiracy existed if they believed Go-Video entered into a contract with Samsung without Samsung's having been subject to litigation.* Relevance to proving the existence of a conspiracy, however, is not a permissible reason under Rule 408 for admitting evidence of a settlement agreement.

(emphasis added).

The above indicates that the district court might have advanced, but did not recognize, a sufficient reason under Rule 408.

Even assuming this is true, however, we cannot find for Go-Video on this issue. As noted above, we review evidentiary rulings for an abuse of discretion and will not reverse absent some

prejudice. Prejudice justifying reversal means that, more probably than not, the error tainted the verdict. Go-Video presented considerable conspiracy evidence relating to the 1983-87 period and the jury knew that Go-Video did not get a supplier until 1987. The fact that Go-Video got a supplier in 1987 would not negate conclusions drawn from that evidence.

Therefore, we conclude that, even if the court had abused its discretion, Go-Video would not be prejudiced to the point justifying reversal. Because this conclusion is dispositive, we do not reach Go-Video's alternative argument that appellees "opened the door" to the evidence.

IV

Jury instructions are considered as a whole. We review challenges to the formulation adopted by the trial judge for an abuse of discretion. *United States v. Beltran-Rios*, 878 F.2d 1208, 1214 (9th Cir. 1989).

A

According to Go-Video, the alleged conspiracy was largely implemented through the activities of trade associations and, therefore, the district court's jury instructions relating to trade associations were crucial. Go-Video claims that the district court erred in its instructions to the jury regarding activities of such associations.

Go-Video claims that the district court erred by giving, over its objection, the following jury instruction:

> As I mentioned, there are many examples of the ways in which competitors can lawfully cooperate through trade associations. Programs which seek to standardize or certify products to enhance safety or promote uniformity for the benefit of consumers are reasonable. Cooperation that seeks to promote research and development of new products, joint marketing, and bargaining activity by trade associations is allowed. The exchange of statistical information relating to

> prices obtained in actual transactions, cost of the product, stocks on hand and transportation costs is lawful. The distribution to trade association members of communications received from persons outside the association, without more, is also lawful.

Go-Video contends that, by this language, the court instructed the jury that all such activities of trade organizations were "*per se lawful*." Go-Video claims that "[i]t would be impossible for *any* antitrust plaintiff to prove a conspiracy effectuated through trade organizations under the instructions given." Go-Video relies on *Allied Tube & Conduit Corp. v. Indian Head*, 486 U.S. 492, 500-04 (1988), for the proposition that, far from being *per se* lawful, such activities are highly suspect, and so the instructions misstate the law.

Appellees counter that the above-quoted "instruction" is but a passage from a comprehensive and lengthy set of instructions which, taken as a whole, correctly instructed the jury. Appellees do not specifically address *Allied Tube & Conduit Corp.* That opinion, however, even though expressing some misgivings relating to the anticompetitive potential of trade associations, is consistent with the jury instructions.

All activities in the offending passage *can* be legal and are subject to rule of reason antitrust analysis if challenged. *See*, 1 Von Kalinowski, *Antitrust Laws and Trade Regulation* § 2.06[1] (1992). Under the rule of reason, the test of legality is whether, considering the circumstances, an alleged restraint is one that promotes competition or one that suppresses competition. *Continental T.V., Inc. v. G.T.E. Sylvania Inc.*, 694 F.2d 1132 (9th Cir. 1982).

The above-quoted instruction, by itself, could mislead the jury because it indicates that all such activities of trade organizations are generally legal. That is not the law. Depending on the circumstances, such activities might not survive rule of reason analysis.

However, appellees are correct that Go-Video quotes the offending instruction out of context. The quoted passage is but a part of one paragraph from several pages of instructions relating to trade associations and conspiracies in restraint of trade. The passage is bracketed at both ends by qualifying or cautionary statements. Immediately before and after the offending passage the district court instructed the jury:

> Trade associations by their nature involve concerted activities, but their activity is not unlawful unless it involves an unlawful conspiracy . . .
>
> Activities of trade associations, like those discussed above, do not by themselves establish restraint of trade.

Subsequent passages from the instructions further mitigate any misleading effect. The court elaborates on specific trade association activities, including general cooperation, exchanges of information, standardization of products, and the establishment and monitoring of trade standards. The jury was instructed that such activities could either foster competition or could restrain competition in violation of the Sherman Act. The jury was told that "[i]t is for you to decide the purpose of any such meetings."

The instructions relating to activities of trade associations, taken properly as a whole, do not constitute an abuse of the district court's discretion.

B

Go-Video claims that the district court erred by giving, over its objection, the following jury instruction relating to circumstantial evidence:

> A conspiracy may be proved by direct or circumstantial evidence that reasonably tends to prove that the defendants "had a conscious commitment to a common scheme designed to achieve an unlawful objective." The antitrust laws, however, impose certain requirements with regard to the reliability and quality of the evidence by which such a

> conspiracy can be established. . . . The plaintiff has relied on circumstantial evidence to prove the existence of a conspiracy among defendants, and you must be careful what inferences to draw from that evidence.

Go-Video correctly argues that conspiracies often must, and may, be proved by circumstantial evidence. *River City Markets, Inc. v. Flemming Food West, Inc.*, 960 F.2d 1458 (9th Cir. 1992).

However, as appellees point out, Go-Video again objects to mere passages of jury instructions. The jury specifically was instructed that Go-Video could rely entirely on circumstantial evidence to prove the alleged conspiracy. True, the jury was also told to be "careful" when drawing inferences from circumstantial evidence. However, that admonition was well qualified. For example, the following sentences (omitted by Go-Video) occur in the instructions within the above-quoted passage:

> A conspiracy may be inferred from the circumstantial evidence only when such inferences are reached by logic and reason, and not based upon speculation or conjecture. Circumstantial evidence does not itself establish the existence of some fact or theory, but rather asks you to infer the existence of a fact from other facts or theories which may have been established in the case.

Similarly, the instructions elsewhere state:

> It is for you to decide whether a fact has been proved by circumstantial evidence. In making that decision, you must consider all the evidence in the light of reason, common sense and experience.

Properly taken as a whole, the instructions clearly indicate to the jury, not that circumstantial evidence is inferior to direct evidence, but that, due to its nature, care is required to make proper inferences from circumstantial evidence. In short, the court's instruction was a correct and reasonable interpretation of the law and did not lead the jury to think that circumstantial evidence in a conspiracy case was suspect.

We conclude that the jury instructions relating to circumstantial evidence did not constitute an abuse of discretion.

C

Go-Video claims that the district court erred by giving, over its objection, the following jury instruction relating to the testimony of Go-Video's chairman, Mr. Dunlap:

> An attorney who testifies as a witness while representing a client does so at a very great detriment to the credibility of his testimony. Mr. R. Terren Dunlap, who testified for plaintiff Go-Video, is also representing Go-Video as its attorney of record in this case but only as its local counsel with little active role as an attorney. You may consider the fact that Mr. Dunlap is counsel of record for plaintiff in this case, together with the extent of his participation as a lawyer, as distinguished from his other capacities with Go-Video, in deciding what weight, if any, to give to his testimony.

Go-Video claims that Mr. Dunlap was local counsel of record in name only and that he played no active role as an attorney in this case. Go-Video argues that the general purpose of such an instruction is to deal with a situation where, at trial, an attorney addresses the trier of fact as both advocate and witness. Go-Video concludes that the instruction was, therefore, improper.

Appellees claim that Mr. Dunlap did, in fact, play a limited role: he attended pre-trial determinations, signed documents, and argued before the court in connection with one motion.

It is hard to conclude that the district court was in error or even remotely unfair in connection with this instruction. The best characterization seems to be that the court stated the generally applicable law correctly, put Mr. Dunlap's role relating to that law in clear perspective, and gave the jury proper guidance for its decision.

The district court did not abuse its discretion by use of this instruction.

V

Go-Video claims that the district court erred in imposing time limits prior to trial and in enforcing those limits, restricting Go-Video's cross-examination and closing argument.

Prior to trial, the district court allowed each side eighty hours of total trial time. Go-Video claims that the district court set the eighty-hour limit without consulting the parties or considering the circumstances or exigencies of the case. Go-Video argues that such arbitrary limitations, set in advance of trial, are improper and, in particular, violate Go-Video's Seventh Amendment right to a jury trial.

According to appellees, the district court, contrary to what Go-Video says, set its eighty-hour per side allocation after consulting with the parties and based on their recommendations. Go-Video, according to appellees, was reminded of the limit during the trial, but chose to "squander" its time on an unnecessarily long presentation of its direct case.

The record shows that the district court allocated time to the parties after consultation and based on the parties' estimates of how long the trial would take. Indeed, the court apparently relied on *Go-Video's* estimate of total trial time needed for both parties. Furthermore, the court expressly stated it was up to each side how to allocate their hours for different phases of their case. The court subsequently warned Go-Video about its use of time. Late in the trial, when Go-Video's allotted trial was about to expire and Go-Video had its cross-examination and closing argument left to perform, the court allowed an additional fifteen minutes per witness for cross-examination and an additional two hours for closing arguments. The record further indicates that the court continued to be flexible, allowing Go-Video even more time.

Generally, district courts have broad discretion to control trials. A court may not, however, deny or unduly restrict cross-examination on a proper subject. *Harries v. United States*, 350 F.2d 231 (9th Cir. 1965). Placing an arbitrary fifteen-minute time limit on cross-examinations, without consideration of subject matter, type of witness, and other factors, might well constitute an abuse of discretion. From all indications, however, the court made exceptions to its rule and granted extra time whenever it thought exceptions were appropriate.

Under the circumstances, the district court did not abuse its discretion by imposing its time limitations.

VI

The evidentiary rulings, jury instructions, and pre-trial imposition of time limits, to which Go-Video objects in this appeal, survive review under the standards we must observe.

AFFIRMED.

Appendix D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GO-VIDEO, INC.,
an Arizona corporation,

Plaintiff-Appellant,

v.

THE MOTION PICTURE
ASSOCIATION OF AMERICA,

Defendant,

and

MATSUSHITA ELECTRICAL
INDUSTRIAL CO., LTD.;
VICTOR COMPANY OF
JAPAN, LTD.,
SONY CORPORATION;

Defendants-Appellees.

Filed Mar. 22, 1993, Cathy A. Catterson, Clerk, U.S. Court of Appeals

No. 91-16039
D.C. No. CV-87-00987-RCB

ORDER

Before: WIGGINS, O'SCANNLAIN, and FERNANDEZ, Circuit Judges.

Appellant's motion to vacate decision and to remand is DENIED.

The panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the en banc suggestion, and no judge of the court has requested a vote on it.

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

APPENDIX E

Sherman Antitrust Act, § 1, 26 Stat. 209, as amended, 15 U.S.C. § 1 (1988)

§ 1. Trusts, etc., in restraint of trade illegal, penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

(July 2, 1890, ch 647, § 1, 26 Stat. 209; Aug. 17, 1937, ch 690, Title VIII, § 1, 50 Stat. 693; July 7, 1955, ch 281, 69 Stat. 282; Dec. 21, 1974, P.L. 93-528, § 3, 88 Stat. 1708; Dec. 12, 1975, P.L. 94-145, § 2, 89 Stat. 801.)